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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ESAU ROGERS, Plaintiff, **v.** **S. RIVAS, et al.,** Defendants.	07-CV-02010 W-JMA **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS THE COMPLAINT** [Fed. R. Civ. P. 12(b), 12 (b)(1), 12(b)(6), 12(f)] Courtroom: D Judge: The Honorable Jan M. Adler **No Oral Argument Required Per Court**

Defendants respectfully submit the following reply to Plaintiff's opposition to their motion to dismiss the Complaint.

OBJECTIONS TO NEW FACTS IN OPPOSITION

At page 2 of his opposition papers, Plaintiff offers new allegations in support of his Complaint. However, "[i]n determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Schneider v. California Department of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998); *see also Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). The new allegations may only be considered by the Court to determine whether leave to amend should be granted. *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137 (9th Cir. 2001). Therefore, Defendants object to the Court considering these new allegations in deciding this motion.

I.

ADMINISTRATIVE REMEDIES WERE NOT UNAVAILABLE TO PLAINTIFF

Plaintiff's theory of liability against most Defendants relates to their roles in processing his administrative grievance against Defendant Rivas. Plaintiff argues he should be excused from failing to exhaust administrative remedies against these Defendants because "there are currently no established procedures, provisions and/or adequate means by which to appeal an appeal decision other than the administrative appeal itself." (Pl.'s Opp'n at 5.)

However, Plaintiff had the option of voicing his complaints about these Defendants' actions, or inactions (related to the processing of the existing appeal against Rivas) when he elevated the appeal to higher levels of review. Plaintiff did not do so. Plaintiff's contention that administrative remedies were unavailable or futile, with respect to Defendants Batchelor, DeGeus, Hernandez, Soukup and Stein, is unfounded.

II.

THERE IS NO BASIS FOR CONSTITUTIONAL LIABILITY IN THE ADMINISTRATIVE GRIEVANCE PROCESS

As previously shown, liability under 42 U.S.C. section 1983 cannot be predicated upon a defendant's involvement in the inmate grievance system. *Buckley v. Barlow*, 997 F.2d 494, 497 (8th Cir. 1993); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). Plaintiff argues the Defendants who reviewed his administrative appeals "knew or should have known to investigate further." (Pl.'s Opp'n at 5.) This reasoning fails because prison officials cannot be held liable for alleged deprivations of constitutional rights where their only alleged role was to process subsequent inmate grievances. This reasoning also does not confront the requirement of causation in showing liability for constitutional violations. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

III.

DEFENDANT ALMAGER CANNOT BE HELD LIABLE UNDER A RESPONDEAT SUPERIOR THEORY OF LIABILITY

Plaintiff argues Defendant Almager is liable for Defendant Rivas' allegedly unlawful search of his prison cell on December 1, 2006, because Almager "knew of the action of his subordinates which resulted in a constitutional violation, and failed to take any preventive action." (Pl.'s Opp'n at 6.) But simply alleging that Almager is charged with "the daily operation of the entire prison . . .." is not sufficient. Plaintiff provided no non-conclusory allegations in the Complaint showing how Almager possible could have known what specific actions Defendant Rivas would take in furtherance of the safety and security of the prison on December 1, 2006. *Respondeat superior* is an insufficient basis for liability under Section 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

IV.

DOCUMENTS INCORPORATED INTO THE COMPLAINT BAR PLAINTIFF FROM STATING A CLAIM IN RETALIATION AGAINST DEFENDANT RIVAS

As shown, the Cell Search Receipt and Cell Search Log, both of which Plaintiff incorporated into his Complaint, demonstrated Defendant Rivas had a legitimate correctional purpose in searching his prison cell on December 1, 2006. *Rhodes v. Robinson* 408 F.3d 559, 567-68 (9th Cir. 2005). These documents showed the cell window was covered (an explicit violation of prison regulations, as indicated on the form), the cell contained excess property, the cell had unauthorized electrical wiring, the cell had an excessive amount of combustibles, and so on. (Compl. 14 of 22.) Plaintiff argues that since he is African-American, and Defendant Rivas is Hispanic, and since he has submitted administrative grievances against her in the past, the disputed cell search must have been motivated by retaliation. (Pl.'s Opp'n at 7.) But these allegations are nothing more than conjecture and conclusions of fact. And the incorporated documents reveal multiple legitimate correctional concerns in Rivas's disputed cell search. Given this fact, Plaintiff's conclusory allegations to the contrary may be rejected by the Court in resolving this motion. *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991).

CONCLUSION

Plaintiff has failed to exhaust administrative remedies against all Defendants except Rivas. Plaintiff has failed to state any cognizable claim for relief against any Defendant under the First or Eighth Amendments related to the search of his prison cell on December 1, 2006. All Defendants are entitled to qualified immunity. Plaintiff's request for punitive damages should be stricken, because he has failed to provide any non-conclusory allegations that any of them acted with an evil motive. Plaintiff cannot amend his Complaint to perfect his constitutional claims without materially contradicting documents already attached to the original Complaint. For this reason, amendment would be futile, and the Court should dismiss the Complaint without leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

Dated: July 9, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Rogers, Esau v. Rivas, et al.**

No.: **07-CV-02010 W-JMA**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 9, 2008, I served the attached **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS THE COMPLAINT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Esau Rogers
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In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 9, 2008, at San Diego, California.

J. Grand — Declarant

[signature] — Signature

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